

**BEFORE THE
DUE PROCESS HEARING OFFICER
EMPOWERED PURSUANT TO
THE INDIVIDUALS WITH DISABILITY EDUCATION ACT
(34 CFR ' 303.420)**

PARENTS OF A MINOR CHILD, _____,)	
)	
Petitioners,)	
)	
vs.)	2004 - DESE - EFW/09
)	
MISSOURI DEPARTMENT)	
OF ELEMENTARY AND)	
SECONDARY EDUCATION)	
)	
Respondent.)	

DECISION

This is the final decision of the Hearing Officer in an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. ' 1439, and 34 CFR ' 303.420 through 34 CFR ' 303.425. The hearing officer, upon consideration of evidence and argument presented in this matter, makes the following findings of fact and conclusions of law and issues the following decision and order:

SUMMARY OF DECISION

At issue, is whether the Missouri Department of Elementary and Secondary Education, through its service provider Cerebral Palsy of Tri-County, failed to provide individual developmental therapy services to _____ as set forth in Individualized Family Services Plan (IFSP). The Hearing Officer concludes that there is substantial evidence in the record presented to find in favor of Petitioner on this issue.

FINDINGS OF FACT

The Parties

1. Petitioners are the mother and father (Parents) of the minor child, _____. Petitioners reside in Carl Junction, Missouri.

2. The minor child, _____ is a two year old female, who was born on _____.

3. Respondent is the Missouri Department of Elementary and Secondary Education (ADESE@). Respondent appeared by its corporate representative, Margaret Strecker, who serves as the assistant director in the compliance section, division of special education.

4. Petitioners are represented by attorneys Daniel D. Whitworth and Bradley R. Barton of the Law Offices of Whitworth, McPherson & Longnecker, L.L.C., in Joplin, Missouri.

5. Respondent is represented by assistant attorney generals Victorine R. Mahon and Nikki Loethen from Jefferson City, Missouri.

6. The System Point of Entry is the Cerebral Palsy of Tri County (Tri-County), which may at times also be referenced as the Webb City Development Center (WCDC).

Procedural History

7. On October 1, 2004, The Parents filed their Request for a Due Process Hearing. The Request states that _____ was to receive individual and group developmental therapy through Cerebral Palsy Center of Tri-County (Tri-County) pursuant to _____s Individualized Family Services Plan (IFSP). The Request alleges that these services were not received. The Request further alleges that Tri-County billed and received payment from DESE for these allegedly unperformed services.

8. The Request references a DESE decision of August 23, 2004, wherein DESE internally investigated similar allegations by the The Parents and determined that: a) insufficient

evidence existed to conclude that the individual therapy billed had not been provided and b) that Tri-County failed to comply with the IFSP in its administration of group therapy services.

9. On October 4, 2004, the Hearing Officer was empowered to adjudicate this dispute on October 4, 2004. No party objected to Hearing Officer presiding over this hearing prior to or during the hearing.

10. The original decision date in this matter was November 1, 2004, pursuant to requirements of 34 CFR ' 303.423 and *Missouri State Application Under Part C of IDEA, Requirement IX B Procedural Safeguards*, p. 36 (2004).

11. On October 13, 2004, The Parents requested an extension of the decision date to December 1. This request was granted without objection.

12. On November 4, 2004, a due process hearing was held at College View State School, 1101 North Goetz Road, Joplin, Missouri. The Parents and Respondent did not file or otherwise raise any objections to the time, date or place for the hearing. A written transcript of the hearing was subsequently produced and provided to both parties.

13. On November 30, 2004, at the request of both parties, the decision date was again extended to the end of business on Friday, December 3, 2004.

Evidence and Witnesses

14. Petitioner called the following witnesses to testify:

- a) Linda Alderman, Classroom Teacher,
- b) Kristina Schweitzer, ABA Implementer,
- c) Candace Garr, Classroom Teacher,
- d) Karla Evans, Service Coordinator,
- e) Carrie Cavitt, Day Care Provider,

- f) _____, Father of Minor Child _____, and
- g) _____, Mother of Minor Child _____

15. Respondent called the following witnesses to testify:

- a) Catherine Ann Cross, Executive Director Tri-County
- b) Marcia Lyn Murdock, Developmental Therapist,
- c) Martha Waugh, Speech Pathologist,
- d) Pamela Wessel, Parent of a Student, and
- e) Christine Miller, Developmental Therapist,

16. **Petitioner=s Exhibit 1** (Personal Therapy Notes of Lyn Murdock) was admitted into the record without objection. **Tr. 101.**

17. **Respondent=s Exhibit A** (records from DESE pertaining to _____) and **Respondent=s Exhibit B** (DESE Decision of August 23, 2004) were admitted into the record without objection. **Tr. 35, 405.**

Findings of Fact

18. _____ was born on December 12, 2001. **Tr. 396; R. Ex. A, Part N (June 17, 2003 IFSP).**

19. _____ was first referred to the Missouri First Steps program on May 12, 2003, when she was diagnosed as Pervasive Developmental Disorder Not Otherwise Specified (PDD NOS). **Id.; R. Ex. B (DESE Decision of August 23, 2003).**

20. _____ has an older brother, _____, born _____, and a younger sister, _____, born _____. Both the brother and sister have diagnoses of PSS NOS.

21. On June 17, 2003, an initial IFSP was developed. _____ was approximately 18 months old at that time. **Tr. 340-41; R. Ex. A, Part N.**

22. The initial IFSP listed speech delay, autism and PDD as the reasons for _____=s eligibility. **R. Ex. A, Part N.**

23. The initial IFSP identified stated that _____ was to receive the following early intervention services:

- a) Service Coordination, as needed;
- b) Special Instruction B individual developmental therapy, once a week for 90 minutes;
- c) Occupational Therapy an applied behavioral analysis (ABA) evaluations for 150 minutes each; and
- d) Special Instruction B group developmental therapy, once a month for 660 minutes.

R. Ex. A, Part N; R. Ex. B.

24. Because _____ was under age three at the time of the initial diagnosis, DESE is the lead agency in Missouri responsible for providing services under the IFSP.

25. DESE contracts with Tri-County (also known as WCDC) to act as the service provider for the area of Missouri where _____ resides. Therefore, Tri-County serves as the System Point of Entry. **Tr. 18, 40-41; Res. Ex. B.**

26. Tri-County has been in existence for 50 years and currently provides services for children with developmental disabilities. **Tr. 16-17, 40.**

27. Tri-County has both a First Steps program (children under age 3) and Early Childhood Special Education program (children age 3 to 21). **Tr. 16-18, 38-41.**

28. Tri-County, on DESE=s behalf, provided services to _____ under its First Steps Program. Those services included both the individual and group developmental therapy services.

29. _____ received services from Tri-County from June 2003 to March 2004.

30. Marcia Lyn Murdock was an employee of Tri-County from August 1998 through

April 2004. At Tri-County, Murdock to provided developmental therapy services¹. **Tr. 45-48.**

31. Murdock was responsible for providing _____s individual and group developmental therapies². **Tr. 46-48; R. Ex. A, Part N at section 7.**

32. Developmental therapy provides for the overall development of the child. By focusing on the whole of the child, a developmental therapist may work with a child on eating skills, toilet training, playing, and peer interaction, as well as fine motor, gross motor, speech, social, and emotional development. **Tr. 47-48.**

33. Developmental therapy should, when at all possible, take place in what is deemed a natural environment for the child. **Tr. 47.**

34. Individual Developmental Therapy is where the developmental therapist works one-on-one with that child and that child only. However, this type of one-on-one focus may take place in a larger group setting through the use of the Apush-in@ technique or methodology where the therapist works side by side with the child on that child=s outcomes in a larger group setting as opposed to Apull-out@, which involves having the child removed from the group for one-on-one therapy. **Tr. 22, 32, 51-52, 145-46.**

35. It is not possible for two children to receive individual therapy at the same time in a group setting even when that therapy is provided using the Apush-in@ technique. **Tr. 106**

36. Even though the IFSP sets the frequency of the services to be provided by number of minutes, Tri-County organizes and bills for the services provided on a per unit basis.

¹ Murdock currently works as a speech pathologist for the Joplin R-8 School District.

² The record also shows that the IFSP was revised on numerous occasions between June and December 2003. However, the developmental therapy services (group or individual) to be implemented by Murdock remained the same. **R. Ex. A and B.**

37. One Aunit@ equals 15 minutes of time. **R. Ex. A, Part R (Attendance Record).**
38. Murdock kept track of the frequency of the services she provided _____ using the unit format. **Tr. 35-37, 48; R. Ex. A, Part R.**
39. Near the end of February 2004, _____=s Parents suspected that their child was not receiving developmental therapy because when they would pick-up their child at 3:00 p.m., they saw the Murdock in the Tri-County office rather than with children. **Tr. 372.**
40. Thereafter, _____=s mother spoke with her daughter=s ABA implementer, Kristine Schweitzer, and two teachers at the WCDC, Linda Alderman and Sara Graue, who opined that _____ and _____=s brother, who also was enrolled at the center, were not receiving developmental therapy. **Tr. 374.**
41. Linda Alderman is employed as a lead teacher at Tri-County and was _____=s lead classroom teacher. **Tr. 205, 105-06.** Alderman testified she never observed Lyn Murdock performing individual therapy on _____ **Tr. 209.** Mr. Alderman further testified that she never saw Lyn Murdock take _____ out of the classroom. **Tr. 210.** Alderman did state, however, that she observe Murdock work with children in her room Aseveral times@ **Tr. 231.**
42. Candance Garr worked in the classroom next to _____=s classroom. She holds a certificate in early childhood development **Tr. 258, 272.**
43. Karla Evans is employed by Community Support Services/First Steps of Southwest Missouri. **Tr. 284.** First Steps of Southwest Missouri is contracted by DESE. **Tr. 300.**
44. Evans serves as the services coordinator for _____=s IFSP. **Tr. 285.** By rule, DESE is required to have a service coordinator to oversee the administration of the IFSP.
45. Evans testified that the Parents raised concerns about whether Murdock was actually

providing the services for which Murdock was billing DESE for through Tri-County. **Tr. 288-89.**

46. Evans conducted an investigation and concluded that the individual therapy services were not provided after looking at progress notes and billing statements.

47. Murdock did not provide individual developmental therapy to _____ in accordance with the IFSP requirement of 90 minutes of therapy per week.

48. If a child was absent, Murdock could not provide therapy. **Tr. 51, 135.**

49. Murdock did not bill separately from Tri-County and assisted in the preparation of the bills to DESE.

50. The record shows occasions where services not rendered were billed as well as occasions where services rendered were not billed. Ms. Murdock only documented for services that she provided.

51. _____ is still eligible for Part C as of the date of this decision.

CONCLUSIONS OF LAW

Jurisdiction

This matter arises under Part C of the Individuals with Disabilities Education Act, 20 U.S.C. ' 1431 to ' 1445, (AIDEA@) and the Federal Regulations implementing its requirements as codified in the Early Intervention Program for Infants and Toddlers with Disabilities at 34 C.F.R. Part 303 (2004). Jurisdiction also exists under Missouri State Regulation 5 C.S.R. ' 70-742.141, which incorporates by reference the *Missouri State Application Under Part C of Individuals with Disabilities Education Act* (2004). These regulations provide the Petitioner with the right to initiate a due process hearing when a dispute arises and empowers an impartial hearing officer to adjudicate the dispute. *Missouri State Application, Requirement IX B Procedural Safeguards*, p. 35-36; 34 C.F.R. ' ' 303.420 and 303.421.

IDEA Requirements

Part C of the IDEA encourages each State to implement and maintain a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families. 34 C.F.R. ' 303.1(a). Missouri meets this requirement through the implementation of its Part C Application, which provides services to children, between the ages of birth and 36 months, who are: a) diagnosed with a physical or mental condition associated with developmental disabilities or b) have a high probability of resulting in a developmental delay or disability. *Missouri State Application, Requirement I B State Eligibility Criteria and Procedures*, p. 18. Eligibility is determined through evaluation and assessment to identify a child=s needs and the intervention services to address those needs. *Id.*, at Requirement V B Evaluation and Assessment and Nondiscrimination Procedures, p. 21-22. Children deemed eligible are entitled to an Individualized Family Services Plan (IFSP). *Id.*, at Requirement VI B Individualized Family Services Plan (IFSP), p. 22. The IFSP is a written plan Athat outlines the provisions of the early intervention services for the child and family.@ *Id.*

Here, the record shows that _____ was diagnosed as PDD NOS in May 2003, at which point she was referred to the Missouri First Steps Program. **R. Ex. B (DESE Decision of August 23, 2003)**. In June 2003, an initial IFSP was developed for _____ **R. Ex. A, Part N**. At the time, _____ was approximately 18 months old. **Tr. 340-41; R. Ex. A, Part N**. The IFSP identified speech delay, autism and PDD as the reasons for _____=s eligibility for early intervention services. The IFSP then directed _____ to receive the following early intervention services:

- a) service coordination, as needed;
- b) special Instruction B individual developmental therapy, once a week for 90 minutes;
- c) occupational therapy an applied behavioral analysis (ABA) evaluations for 150 minutes each; and

- d) special Instruction B group developmental therapy, once a month for 660 minutes.

Under the Part C Application, the State of Missouri has an affirmative duty to assure that a current IFSP is in effect and implemented for each eligible child and the child=s family.@ *Id.*, at 23.

In Missouri, DESE is designated as the lead agency responsible for ensuring the provision of early intervention services to eligible infants and toddlers with disabilities and their families. *Missouri State Application, General Application Requirement B B Lead Agency*, p. 11. Therefore, DESE bears ultimate responsibility for ensuring that _____=s IFSP was implemented.

Issues Raised at the Due Process Hearing

The Parents do not question the scope or the extent the intervention services to be delivered to _____ under the IFSP. In fact, the Hearing Officer concludes that no evidence was offered attacking the validity of the IFSP. Instead, the Parents assert that certain early intervention services called for under the IFSP were never provided. Specifically, Parents allege that _____ never received: a) individual developmental therapy and b) group developmental therapy. Further, The Parents assert that DESE=s service provider B Tri-County B fraudulently billed for and received payment for these non-performed services. The record shows that Murdock was the Tri-County representative responsible for providing _____ both individual and group developmental therapies.

Prior to the November hearing, DESE filed a motion to dismiss this proceeding wherein DESE asserted that the claim of fraudulent billing for services not provided called for relief that exceeded the powers granted. While the motion was properly denied, the Hearing Officer now concludes that the Parents have no standing to seek B on their own behalf or on DESE's behalf B the reimbursement of monies paid by DESE to its service provider for services that may not have been rendered.³ However, this determination does not prevent the Parents from receiving compensatory services if sufficient evidence exists to find that the services required were not provided.

The Parents also abandoned at the outset of the hearing their claim as it related to group developmental therapy. **Tr. 14.** Even though this issue was specifically raised in the Parents' Request, the issue was abandoned based on the DESE determination of August 23, 2004. **Tr. 12-14; Res. Ex. B.** Therefore, the only issue remaining for determination is whether _____ received the individual developmental therapy in accordance with the IFSP adopted and approved for _____ and her family for the period June 16, 2003 through May 2004. In other words, did Tri-County, as the service provider for DESE, administer to _____ individual developmental therapy once a week for 90 minutes?

Burden of Proof

The IDEA is silent as to which party bears the burden of proof in a State administrative proceeding. DESE argues that when a statute is silent, the burden of proof is normally allocated to the party initiating the proceeding and seeking relief. @ *Weast v. Schaffer*, 377 F.3d 449, 452 (4th Cir. 2004) (concluding that the parents challenging the sufficiency of an Individual Educational Plan

³ Further, the Parents' proposed decision only asks for compensatory services and attorney's fees as relief.

(IEP) bore the burden of proof at the administrative hearing). While this default position may seem logical, it is nonetheless at odds with holding in *E.S. v. Independent Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998). There, the Eighth Circuit held that the school system bore the burden of proving that a proposed IEP satisfied the requirements of the IDEA and would provide the student with a free appropriate education. 135 F.3d at 569.

DESE argues that *E.S. v. Independent Sch. Dist. No. 196* is distinguishable from this case because there is no challenge to the adequacy of the IFSP or the procedural protections prescribed by IDEA. DESE correctly asserts that this case involves a factual dispute as to whether services were delivered in conformity with the IFSP. **Tr. 14.** DESE opines that it has no greater expertise and no better access to information and witnesses than do the Parents. Thus, the Parents B as the initiating party seeking relief B should bear the burden of proof. The problem with this argument is that it assumes that this is the reason the Eight Circuit imposed the burden. As the court in *Weast* noted, A[t]hree other circuits, the Second, Eighth, and Ninth have announced *without explanation* that the school system has the burden of proving the adequacy of the IEP at the administrative hearing.@ 377 F.3d at 453 (emphasis added). The Hearing Officer=s own review of the Eighth Circuit decision finds no express rationale for the position stated. The Court simply announces that at Athe administrative level, the District clearly has the burden of proving that it had complied with the IDEA.@ *E.S. v. Independent Sch. Dist. No. 196*, 135 F.3d at 569.

However, a more compelling reason for not adopting this burden here is the fact that *E.S. v. Independent Sch. Dist. No. 196* involved a dispute arising under Part B of IDEA. Part B is a separate and distinct process from Part C. 34 C.F.R. ' 303.4. Furthermore, the statutory underpinnings for Parts B and C, respectively, are different. See 20 U.S.C ' 1415, 20 U.S.C. ' 1439. Under 34 C.F.R. ' 303.420, a State may adopt the due process procedures of 34 C.F.R. ' 300.506 through ' 300.512

(Part B of the IDEA) or by adopting procedures that meet the requirements of 34 C.F.R. ' 303.419 through 425 (Part C of the IDEA). Missouri has adopted the latter through its Part C Application. The Hearing Officer finds these differences significant enough to conclude that the Eighth Circuit precedent is not binding. To the extent any Part B federal case law is persuasive, the Hearing Officer finds the rationale in *Weast* more convincing. Generally, the burden of proof is on the party who should lose if no evidence is offered by either side. 377 F.3d at 456. To hold that DESE has the initial burden to show that the services contemplated in the IFSP were provided would effectively mean that every challenged IFSP is presumptively inadequate. Such a policy seems contrary to the basic policy of the IDEA. 377 F.3d at 456.

Individual Developmental Therapy

Parents contend that _____ did not receive the 90 minutes (4 units) of individual therapy owed weekly under the IFSP. In support of this position, Parents presented testimony from several witnesses, cross examined Respondent=s witnesses and argued the sufficiency of certain exhibits. Both Parents also testified in support of their position. In defense, DESE provided the relevant records for _____ as well as several fact witness, including Lyn Murdock who was responsible for providing the disputed therapy.

The standard of proof is a preponderance of the credible evidence. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992). Missouri case law recognizes that the Credibility of witnesses and inconsistencies in testimony are for the [fact finder] to consider.@ *State v. Maynard*, 954 S.W.2d 624, 631 (Mo.App. W.D. 1997). The Hearing Officer must judge the credibility of witnesses, and has the discretion to believe all, part, or none of the testimony of any witness. *Harrington*, at 19. When there is a direct conflict in the testimony, the Hearing Officer must make a choice between the conflicting testimony. *Id.* Issues such as witness bias and credibility are still

considered even when the witness has been qualified as an expert in a particular field. The fact a witness is qualified as an expert does not relieve the fact finder of these other considerations. *Maynard*, at 632; See, *State v. Battle*, 879 S.W.2d487, 491 (Mo. banc. 1983). The Findings of Fact and Conclusions of Law reflect the Hearing Officer=s determination of the credibility of witnesses.

Linda Alderman who was _____=s classroom teacher at Tri-County. **Tr. 205, Tr. 105-06.** Alderman testified she never observed Murdock performing individual therapy on _____. Alderman further testified that initially she was unaware that _____ was to receive services from Murdock. **Tr. 211.** While DESE contends Alderman was not qualified to know the inner workings of how this therapy should be provided, the Hearing Officer finds her overall testimony credible enough to raise doubt about implementation of the individual therapy by Murdock. Alderman has been at Tri-County for almost four years. **Tr. 204.** She has a high school education and a child care certification, but she does not have a college education or a teaching certificate. **Tr. 206, 223.** She is the lead teacher in the toddler room. She was present through out most of the school day. Murdock has testified that all therapy took place in the classroom. Therefore, Alderman had the opportunity to observe.

Karla Evans is employed by Community Support Services/First Steps of Southwest Missouri. **Tr. 284.** First Steps of Southwest Missouri is contracted by DESE. **Tr. 300.** Evans serves as the services coordinator for _____=s IFSP. **Tr. 285.** Evans testified that the Parents raised concerns about whether Murdock was actually providing the services for which Murdock was billing DESE for through Tri-County. **Tr. 289.** By rule, DESE is required to have a service coordinator to oversee the administration of the IFSP. 34 C.F.R. 303.23. Under the Part C Application, the service coordinator has responsibility for coordinating services across the agency lines and serving as a single point of contact. The service coordinator ensures that Aservice coordination@ takes place as

that term is defined under 34 C.F.R. 303.23. *Missouri State Application, Requirement A B Definitions*, p. 10-11. DESE contests her testimony. However, their argument is unpersuasive. Under DESE=s own rule, an individual serving as a Aservice coordinator@ must exhibit certain qualifications and have appropriate knowledge about the IFSP process. *Missouri State Application, Requirement A B Definitions*, p. 10-11. Thus, if Evan=s is competent enough to be a service coordinator, she is competent to testify as to whether the services she oversaw for _____ were actually provided. DESE=s assertion that she agreed Murdock was only paid for the time Murdock billed misses the point. The evidence supports a finding that Murdock billed for services (individual developmental therapy) that was not actually performed.

Lyn Murdock was the therapist responsible for providing the therapy at issue. The Hearing Officer finds her only somewhat credible when viewed in light of the entire record. By her own admission, in February 2004, she took on additional administrative responsibilities that kept her out of the classroom at various times. By her own admission, records she kept did not always conform to the services actually performed or billed.

Therefore, the Parents have sufficiently proven that _____ did not receive individual developmental therapy in accordance with the IFSP. The Hearing Officer does not conclude that no therapy was provided to _____. The records supports a determination that _____ received some individual therapy sporadically. However, the record does not permit the Hearing Officer to determine with reasonable accuracy what amount of therapy was provided. Therefore, the Parents are entitled to compensatory services for the entire period. That said, neither the IDEA, nor any federal or state regulation, has been identified as requiring that therapy services be provided or compensated when the child=s absence precluded the provision of the service. Therefore, any award of compensatory services may be mitigated by the number of days that _____ was absent from Tri-

County from June 2003 through March 2004.

ORDER

The Hearing Officer having impartially considered all the evidence presented finds:

- A) in favor of Petitioners= Request for Due Process;
- B) that _____ should receive compensatory time from June 2003 to March 2004 for individual developmental therapy as set forth in the IFSP of June 2003, minus any day that _____ was not present at the facility based on the attendance logs in Respondent Exhibit A; and
- C) denies Petitioner request for attorneys fees as outside the relief permitted under Part C of the IDEA.

SO ORDERED this ____ Day of December, 2004.

EDWARD F. WALSH
HEARING OFFICER

Copies mailed to:

Pam Williams, DESE

Dan Whitworth, attorney for petitioner

Vickie Mahon, attorney for respondent DESE

Certification of Impartiality

I, Edward F. Walsh, certify that I am an impartial person as provided for in 34 C.F.R. 303.421 (2004). I am not an employee of the Missouri Department of Elementary and Secondary Education or the Webb City Development Center. I have no personal or professional interests that would conflict or interfere with, or otherwise impair my ability to act impartially or objectively in the determination of this dispute. I was as the appointed hearing officer and am paid for hearing officer services under contract.

Given this _____ day of _____ 2004.

Edward F. Walsh
Hearing Officer

NOTICE OF RIGHT TO APPEAL

Any party aggrieved by the hearing officer=s decision may bring an appeal to a court of proper jurisdiction. Pursuant to 34 C.F.R. ' 303.424 an aggrieved party may file a civil action in State or Federal court. To the extent this action is govern by Chapter 536, RSMo, a APetition for Judicial Review@ in state court may be filed by the aggrieved party. Section 536.110, provides that such an appeal must be filed within 30 days of the mailing or delivery of the decision. An aggrieved party may also file an appeal in federal court by filing a complaint in a district court of the United States, without regard to the amount in controversy.
